

COMMENTS OF E.SPIRE COMMUNICATIONS, INC.
APPLICATION OF SBC COMMUNICATIONS ET AL. FOR
271 AUTHORIZATION IN ARKANSAS AND MISSOURI

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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ORIGINAL

In the Matter of

Joint Application by SBC Communications Inc.,)
Southwestern Bell Telephone Company, and)
Southwestern Bell Communications Services,)
Inc. d/b/a Southwestern Bell Long Distance)
for Provision of In-Region, InterLATA)
Services in Arkansas and Missouri)

CC Docket No. 01-194

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OFFICE OF THE SECRETARY

COMMENTS OF E.SPIRE COMMUNICATIONS, INC.

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Dated: September 10, 2000

Attorneys for E.SPIRE COMMUNICATIONS, INC.

**COMMENTS OF E.SPIRE COMMUNICATIONS, INC.
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271 AUTHORIZATION IN ARKANSAS AND MISSOURI**

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SUMMARY

SWBT's application for 271 authority in Missouri and Arkansas should not be granted, since SWBT has failed to meet the required standards for satisfaction of Checklist items in either state. e.spire notes that, despite its representations of compliance to the Commission, SWBT is engaged in bad faith manipulation deliberately intended to deprive e.spire of its opt-in rights under Section 252(i) of the 1996 Act. In e.spire's case, this manipulation took the form of stalling any response to e.spire's May 2, 2001 opt-in request until *after* the effective date of the Commission's ISP Reciprocal Compensation Order (May 15, 2001), thereafter claiming that e.spire is no longer eligible to opt into the ISP reciprocal compensation provisions of the Worknet Agreement in Missouri. In Arkansas, SWBT is improperly claiming that the AT&T Agreement requested by e.spire on May 2, 2001 is no longer available for opt-in, based on the assertion that it has already been "made available for a reasonable time," and that it may therefore be removed from the list of agreements available for opt-in.

Both of these actions violate e.spire's rights under Section 252(i) of the 1996 Act, thereby violating Section 251(c)(2) of the 1996 Act, and Checklist Item 1, which by its express terms requires compliance with Section 251(c)(2). More importantly, the disingenuous and high-handed manner in which SWBT is attempting to skirt its legal obligations to the detriment of its competitors such as e.spire is a clear indication that SWBT's applications in Missouri and Arkansas are premature at this juncture, and should be rejected.

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Services in Arkansas and Missouri)	

COMMENTS OF E.SPIRE COMMUNICATIONS, INC.

e.spire Communications, Inc. (“e.spire”), by its attorneys, and in accordance with the Commission’s August 20, 2001 Public Notice (DA 01-1952), hereby submits these Comments in opposition to the above-captioned application of SBC Communications, Inc. d/b/a Southwestern Bell and its named subsidiaries and affiliated entities (hereinafter collectively referred to as “SWBT”) for authority to provide in-region, interLATA services in the States of Arkansas and Missouri.

SWBT has failed to demonstrate, as required by Section 271 of the Telecommunications Act of 1996 (the “1996 Act”), that competitive conditions in the local telecommunications markets in Arkansas and Missouri support grant of its application for in-region, interLATA authority or that any fledgling competition there could survive if the Section 271 in-region, interLATA entry restriction on SWBT is lifted. Specifically, SWBT has failed to comply, at a minimum, with Checklist Item One of the Competitive Checklist (interconnection in accordance with the requirements of sections 251(c)(2) and 252 (d)(1). Accordingly, for the reasons discussed more fully below, e.spire urges the Commission to deny SWBT’s application.

I. INTRODUCTION

e.spire is a facilities-based integrated communications provider, serving small and medium-sized businesses. The Company is one of the first Competitive Local Exchange Carriers (“CLECs”) to combine the provision of voice services, such as dedicated access, local, and long distance, with advanced data services, such as frame relay, asynchronous transfer mode (“ATM”), and Internet services. The Company currently offers voice services in 28 U.S. markets, has state-of-the-art local fiber optic networks in 38 markets, and offers data services by providing access to over 400 data points-of-presence (“POPs”). Through its subsidiary, ACSI Network Technologies, Inc., e.spire also offers network design and construction services to CLECs, interexchange carriers (“IXCs”), corporations, and municipalities in selected markets in the United States. e.spire currently provides Arkansas and Missouri consumers with integrated CLEC and interexchange (“IXC”) telecommunications services, over its own facilities, including operational Lucent 5ESS switches in Little Rock, Arkansas and Kansas City, Missouri.

e.spire has invested billions of dollars in equipment, services, and human resources to achieve the execution of its facilities-based market entry strategy. However, e.spire’s facilities-based competitive entry in Arkansas and Missouri is being stymied by SWBT’s refusal to provide competitors with access to network elements on a just, reasonable and nondiscriminatory basis as required by Section 271 and 251 of the 1996 Act. In addition, SWBT has not demonstrated that it complies with Checklist Item 1, which requires SWBT to provide interconnection in accordance with the requirements of Sections 251(c)(2) and 252(d)(1) of the 1996 Act. In these comments, e.spire demonstrates how SWBT seeks to evade the requirements of the 1996 Act with respect to interconnection agreement “opt-ins,” delaying and manipulating

to deprive competitive carriers such as e.spire of their rights under law to take advantage of the terms and conditions of approved interconnection agreements that SWBT has concluded with other carriers.

II. SWBT ILLEGALLY REFUSES TO ALLOW E.SPIRE TO OPT INTO STATE COMMISSION-APPROVED INTERCONNECTION AGREEMENTS IN MISSOURI AND ARKANSAS, IN VIOLATION OF SECTION 252 OF THE 1996 ACT

A. Legal Basis

Item 1 of the Competitive Checklist of Section 271 requires SWBT to provide “interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).”¹ Section 251(c)(2) requires SWBT to provide any requesting telecommunications carrier interconnection to its network

on rates, terms and conditions that are just, reasonable and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.²

Section 252 of the 1996 Act, provides, *inter alia*, that:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.³

Significantly, the 1996 Act *does not* place any qualifications upon an ILEC’s obligation to make available to a requesting telecommunications carrier interconnection on the same terms and conditions provided to another carrier in an approved agreement. This obligation is not subject

¹ 47 U.S.C. § 271(c)(2)(B)(i).

² 47 U.S.C. § 251(c)(2)(D).

³ 47 U.S.C. § 252(i).

to an ILEC's consent or discretion: an ILEC cannot unreasonably discriminate between carriers, allowing one carrier beneficial interconnection terms, while denying them to another. The Commission Rule implementing Section 252(i) also mandates strict ILEC obedience, further clarifying that:

An incumbent LEC may not limit the availability of any individual interconnection, service or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (*i.e.*, local, access, or interexchange) as the original party to the agreement.⁴

B. SWBT's Deliberate Denial of e.spire's Opt-In Rights

In spite of the foregoing unambiguous legal requirements, SWBT has denied e.spire opt-in access to approved interconnection agreements in Arkansas and Missouri. On May 2, 2001, e.spire sent a letter to Ms. Suzette Wolfe, Area Manager – Negotiations of SWBT, asserting, pursuant to Section 252(i) of the 1996 Act, its opt-in rights with respect to the Arkansas Interconnection Agreement between SWBT and AT&T Communications of the Southwest, Inc.⁵ As explained in the letter, the AT&T agreement had been filed with the Arkansas Commission on June 10, 1998.⁶ e.spire's letter also asserted e.spire's opt-in rights with respect to the agreement between SWBT and MCImetro Access Transmission Services, Inc. in the State of Missouri. As an alternative, if the MCImetro agreement were "legitimately not available," e.spire asserted its opt-in rights with respect to the agreement between SWBT and Worknet Communications, Inc. ("Worknet ") in Missouri.⁷ The letter went on to request that, if SWBT

⁴ 47 C.F.R. § 51.809(a).

⁵ e.spire's May 2, 2001 Letter is attached as "**Exhibit 1**" hereto.

⁶ *Id.* at 1.

⁷ *Id.*

considered any of the specified agreements to be unavailable, SWBT state with particularity the reasons therefor.

e.spire's May 2, 2001 letter was an outgrowth of earlier discussions between the parties during which e.spire had inquired whether it could opt into the MCImetro agreement, or, failing that, the Worknet Agreement (which itself was an opt-in to the MCImetro agreement) in Missouri. In these discussions, memorialized in the parties' emails, SWBT conceded that the Worknet Agreement was in fact available for opt-in.⁸

Despite this concession, and ignoring e.spire's May 2 letter requesting the Worknet opt-in, SWBT was unresponsive, neither providing the Worknet Agreement nor providing any reason why the Worknet Agreement could not be made available. On July 16, approximately 2½ months after e.spire's request letter, SWBT finally responded by email, proposing that e.spire accept the Worknet Agreement – not in the form it existed as of the date of e.spire's request – but as subsequently modified by a “Reciprocal Compensation Appendix” that purported to modify (adversely) the terms of the Worknet Agreement with respect to reciprocal compensation.⁹ Essentially, SWBT had simply stalled e.spire's opt-in to the Worknet Agreement for more than two months, and had then attempted to change the terms of the opt-in to include less favorable reciprocal compensation terms. e.spire immediately objected to this erroneous treatment in an email from James Falvey to Suzette Wolf dated July 17, 2001.¹⁰

⁸ See emails dated April 20 and April 24, 2001 between James Falvey of e.spire and Suzette Wolf of SWBT (attached as **“Exhibit 2”** hereto).

⁹ See email dated July 16, 2001 from Suzette Wolf of SWBT to Jim Falvey of e.spire (attached as **“Exhibit 3”** hereto).

¹⁰ See email dated July 17, 2001 from Jim Falvey of e.spire to Suzette Wolf of SWBT (attached as **“Exhibit 4”** hereto).

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Thereafter, in a letter dated July 24, 2001 from Susan Lord of SWBT to James Falvey of e.spire, SWBT took the position that the Worknet Agreement is available for “sectional adoption” only, and that in particular, e.spire could not opt into the terms and provisions for ISP compensation “because the recent FCC order”¹¹ held that such ISP compensation provisions are outside the permissible scope of Section 252(i) as of April 18, 2001.”¹² Quixotically, Ms. Lord’s letter itself went on to note that the ordering clauses of the FCC’s ISP Reciprocal Compensation Order stated that:

the provision of this Order prohibiting carriers from invoking section 252(i) of the Act to opt into an existing interconnection agreement as it applies to rates paid for the exchange of ISP-bound traffic will be effective immediately upon publication of this Order in the Federal Register.¹³

As Ms. Lord’s letter *itself* specified, the ISP Reciprocal Compensation Order was not published in the Federal Register until May 15, 2001 nearly *2 calendar weeks after* e.spire made its May 2, 2001 formal request for opt-in rights with respect to the Worknet Agreement. Accordingly, if SWBT had honored e.spire’s request for opt-in with respect to the Worknet agreement as of the date it was made, e.spire would have been entitled to take advantage of the ISP reciprocal compensation language contained in that original agreement, without any subsequent amendment.

¹¹ Referring to *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68 (rel. April 27, 2001) (“ISP Reciprocal Compensation Order”).

¹² Letter from Susan Lord, SWBT to James Falvey, e.spire, dated July 24, 2001 (attached as **“Exhibit 5”** hereto). Additionally, SWBT claimed that the ISP reciprocal compensation terms of the Worknet Agreement had been “made available for a reasonable amount of time and are no longer available for adoption.” *Id.* at 2.

¹³ *Id.* at 2.

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Clearly, SWBT simply delayed its response to e.spire's opt-in request until after the May 15, 2001 Federal Register publication date in order to manufacture this excuse not to allow e.spire to access the relatively more favorable reciprocal compensation language contained in the original Worknet Agreement. In fact, SWBT almost admits this in Ms. Lord's letter:

Southwestern Bell has also reviewed e.spire's alternative request to adopt the Worknet Agreement *The review process associated with e.spire's request took additional time so that Southwestern Bell could evaluate the impact of the FCC's recent order on reciprocal compensation.*¹⁴

In addition to these transparent delaying tactics in Missouri, SWBT has also improperly denied e.spire its requested opt-in rights with respect to the AT&T Agreement for Arkansas, taking the position that the AT&T Agreement has been "made available for a reasonable amount of time" and is no longer available for adoption. As a consequence, e.spire is now placed in the position of having to consider its legal options in opposition, including at the very least the filing of a complaint against SWBT before the Arkansas commission. The Commission should note that e.spire has attempted to resolve the Missouri and Arkansas problems in good faith, and has even offered SWBT a settlement of the outstanding differences. But SWBT has not responded to these overtures.

SWBT's actions are redolent of bad faith manipulation: instead of attempting to work with e.spire as required to implement e.spire's rights under Section 252(i) of the 1996 Act, SWBT's *modus operandi* in Missouri and Arkansas is to craft improper artful stalling and dodging tactics intended to deny e.spire access to terms and conditions contained in approved interconnection agreements with other carriers. These willfully non-compliant actions are

¹⁴ *Id.* at 1 (emphasis supplied).

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scarcely consistent with the benevolent image SWBT seeks to assume in the 271 proceeding before this Commission. In fact, they are directly and intentionally violative of Checklist Item 1, since they fly in the face of Section 252(i) of the Act, and the Commission's Rule implementing that statutory provision.


III. CONCLUSION

For the foregoing reasons, e.spire urges the Commission to deny SBC's application until it has fully complied with the Section 271 competitive checklist and the 1996 Act's goal of widespread and sustainable facilities based local competition is realized.

Respectfully submitted,

E.SPIRE COMMUNICATIONS, INC.

By: _____


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Phone (202) 955-9600

Attorneys for E.SPIRE COMMUNICATIONS, INC.

Date: September 10, 2001

CERTIFICATE OF SERVICE

I, the undersigned Michele Butler, a secretary in the law firm of Kelley Drye & Warren LLP hereby certify that true and complete photocopies of the foregoing "Comments" was served September 10, 2001 via courier on the following:

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Michele Butler

**COMMENTS OF E.SPIRE COMMUNICATIONS, INC.
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EXHIBIT 1



May 2, 2001

Via Facsimile and Regular Mail

Ms. Suzette Wolfe
Area Manager - Negotiations
Southwestern Bell Telephone Co.
311 So. Akard, 8th Floor
Dallas, TX 75202

Dear Suzette:

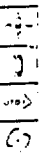
e.spire Communications, Inc. ("e.spire") hereby requests, pursuant to Section 252(i) of the Communications Act, 47 U.S.C. Sec. 252(i), to opt into, in the state of Arkansas, the Arkansas interconnection agreement between Southwestern Bell Telephone Company ("SWBT") and AT&T Communications of the Southwest, Inc. filed with the Commission on June 10, 1998, and currently on file with the Arkansas Commission. e.spire also hereby requests, pursuant to Section 252(i) of the Communications Act, 47 U.S.C. Sec. 252(i), to opt into, in the state of Missouri, the agreement between SWBT and MCImetro Access Transmission Services, Inc. In the event that such agreement is legitimately not available, e.spire hereby alternatively requests, pursuant to Section 252(i) of the Communications Act, 47 U.S.C. Sec. 252(i), to opt into, in the state of Missouri, the agreement between SWBT and WorkNet Communications, Inc.¹

If SWBT considers any of the above agreements to be no longer available, e.spire requests that SWBT state the reason with particularity.

e.spire understands that the agreements will include the amendment agreed to by the parties in their February 9, 2001 settlement agreement, and that the reciprocal compensation rates in these agreements will be retroactive to January 1, 2001, subject to the terms and conditions of the settlement.

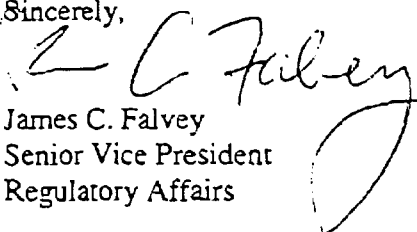
¹ On February 16, 2001, e.spire expressed an interest in opting into, in the states of Missouri and Arkansas, the Kansas interconnection agreement between SWBT and AT&T Communications of the Southwest, Inc. currently on file with the Kansas Corporation Commission. As a result of that request, SWBT prepared for e.spire, consistent with its interpretation of the SBC-Ameritech merger conditions, and sent to e.spire for review, those agreements. Upon reviewing the two agreements, e.spire is no longer interested in opting into either. The opt-in requests in this letter are in lieu of e.spire's prior opt-in requests.

REGULATORY DEPARTMENT
e.spire Communications, Inc.
131 National Business Pkwy, Suite 100
Annapolis Junction, MD 20701
phone 301.361.4200
fax 301.361.4277
www.espire.net



Thank you for your personal efforts in providing e.spire information with respect to these opt-ins, and please do not hesitate to contact me with any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "J C Falvey", with a large, stylized flourish extending from the bottom right.

James C. Falvey
Senior Vice President
Regulatory Affairs

cc: Larry Cooper
Tracy Turner, Esq.
Brad Mutschelknaus, Esq.
John Heitmann, Esq.

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EXHIBIT 2

Jarvis, Ronald

From: Falvey, Jim [Jim.Falvey@espire.net]
Sent: Wednesday, September 05, 2001 6:49 PM
To: 'rjarvis@kelleydrye.com'
Subject: FW: Missouri Opt-In

This is the agreement we wanted. They at first said it was available.

-----Original Message-----

From: WOLFE, SUZETTE (SWBT) [mailto:mw5204@sbc.com]
Sent: Tuesday, April 24, 2001 6:26 PM
To: Falvey, Jim
Subject: RE: Missouri Opt-In

Mr. Falvey,

Per our telephone conversation this afternoon, the Worknet Agreement is available for adoption.

Suzette Wolfe
Area Manager - Negotiations
Southwestern Bell Telephone Co.
311 So. Akard, 8th Floor
Dallas, TX 75202
Tele: 214-464-5646
Fax: 214-464-8528
Email: mw5204@txmail.sbc.com

-----Original Message-----

From: Falvey, Jim [mailto:Jim.Falvey@espire.net]
Sent: Friday, April 20, 2001 3:56 PM
To: WOLFE, SUZETTE (SWBT)
Subject: Missouri Opt-In

If the Missouri Worknet is an opt-in to an MCI agreement, isn't the underlying MCI agreement also available? Please let me know when you have a minute.

-----Original Message-----

From: WOLFE, SUZETTE (SWBT) [mailto:mw5204@sbc.com]
Sent: Monday, February 12, 2001 2:38 PM
To: Falvey, Jim
Subject: Covad - MO

Mr. Falvey,

Attached is COVAD Missouri Agreement. Compensation is addressed in the GT&C's.

> <<01 Gt&c.doc>> <<12 ITR.doc>> <<12A ltr Drawing.doc>>
Suzette Wolfe
Area Manager - Negotiations
Southwestern Bell Telephone Co.
311 So. Akard, 8th Floor
Dallas, TX 75202
Tele: 214-464-5646

Fax: 214-464-8528
Email: mw5204@txmail.sbc.com

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EXHIBIT 3

Jarvis, Ronald

From: Falvey, Jim [Jim.Falvey@espire.net]
Sent: Wednesday, September 05, 2001 6:44 PM
To: 'rjarvis@kelleydrye.com'
Subject: FW: e.spire mfn into Worknet-MO with negotiated Reciprocal Compensation Appendix



Recip Comp MFN
Appendix Post F...

-----Original Message-----

From: WOLFE, SUZETTE (SWBT) [mailto:mw5204@sbc.com]
Sent: Monday, July 16, 2001 3:04 PM
To: Falvey, Jim
Subject: e.spire mfn into Worknet-MO with negotiated Reciprocal Compensation Appendix

Mr. Falvey,

Attached, for your review, is the Reciprocal Compensation Appendix. I look forward to discussing it with you.

<<Recip Comp MFN Appendix Post FCC 071301.doc>>

Suzette Wolfe
Area Manager - Negotiations
Southwestern Bell Telephone Co.
311 So. Akard, 8th Floor
Dallas, TX 75202
Tele: 214-464-5646
Fax: 214-464-8528
Email: mw5204@txmail.sbc.com

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EXHIBIT 4